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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1905.

No. 233.

A. H. LEONARD, GEORGE R. WILSON, R. W. SMITH, *ET AL.*

PLAINTIFFS IN ERROR,

vs.

THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY,

J. H. McCORMICK, RECEIVER,

AND

C. C. HARVEY.

BRIEF FOR DEFENDANT RAILROAD COMPANY, APPELLEE.

FRANK P. STUBBS,
W. H. WISE,
Attorneys for V., S. & P. Railway Company.

To the Honorable the Supreme Court of the United States:—

Mr. W. H. Wise and Mr. Frank P. Stubbs, as Counsel preparing the petition in this cause, who tried the same in the Court of Original Jurisdiction, as well as in the Supreme Court of Louisiana, where they presented an exhaustive brief on the facts and the law, respectfully attaching hereto their said brief, present the same as supplemental to the argument heretofore filed in your Honorable Court by Mr. H. H Hall and this Counsel, and pray that the same be duly considered.

Respectfully submitted,

Frank P. Stubbs,

W. H. Wise,

Attorneys for V., S. & P. Ry. Co., Appellee.

SUPREME COURT OF LOUISIANA

No. 14,855.

V. S. & P. RAILROAD COMPANY

versus

ALBERT TIBBS Et Als.

Appeal from District Court, Caddo Parish,
Hon. J. D. Watkins Sitting as Parish Judge.

ARGUMENT FOR PLAINTIFF, APPELLEE.

SYLLABUS.

1. Under the Act of the 3rd of June, 1856, lists of land selected by the grantee and certified by the General Land Office, convey as complete title as patent. U. S. Rev. Stat. Sec. 2449; No. 6 Land Decis. 543; 115 U. S. 102; 116 U. S. 381.

2. By second section of the Swamp Land Act of 1849-1850, the power and the duty devolved upon the Secretary of the Interior, as the head of the Department which administered the affairs of the public lands, of determining what lands were of the description granted by the Swamp Land Act, and made his office the tribunal, whose decision on the subject was to be controlling. 93 U. S. 169.

3. The exclusion of the lands in dispute from the Swamp Lands selected and patented to the State, and those included in the selection as lands coming within the canal grant, with the approval of such selection by the Interior Department and the certification thereof to the grantee, operated to pass the title thereto as completely as could have been done by formal patent. 149 U. S. 79.

4. The Secretary of the Interior was made the final arbiter of the nature of a given piece of land, whether swamp or not. His judgment on the question was final. 80 U. S. 72; 93 U. S. 169.

5. Now, the selection by the State of certain lands, under the grant of June 3rd, 1856, with the approval of the Secretary of the Interior, and the certification of the Department that they were covered by the granting act, is such an adjudication of the question as excludes the introduction of parol evidence to contradict. 149 U. S. 79.

6. Parol evidence is admissible to show, in opposition to the concurrent action of Federal and State officers having authority in the premises, that certain lands were in fact, at the date of the Swamp Land Act of 1850, swamp and overflowed lands. 159 U. S. 332.

7. The certificate of the Secretary of the Interior in 1858, that certain lands inured to the State under the Railroad Act of 1856, was a decision that they were not embraced by the Swamp Land Act of 1850. 164 U. S. 559.

8. The acceptance of the State of lands certified to it by the Secretary of the Interior, as included in the Railroad Grant of 1856, is conclusive upon the State and upon persons deriving

their rights from it, against a claim to the lands under the Swamp Land Act of 1850, where no patent has been issued or identification of these lands made by the Secretary of the Interior under the latter act. *Ib.*

9. The Swamp Land Act of 1850 gave an inchoate title to the State, but the identification of the lands by the Secretary of the Interior was necessary before the title became perfect or the State was entitled to a patent which vested the fee simple title. *Ib.*

10. Shallow Lakes were never construed to be swamp lands by the Land Department of the Government, and were excluded from the patents. Resolution No. 27 by the State of Louisiana, March 5th, 1853.

11. The sale or disposition of land, the property of another, is a nullity; ownership is essential in the vendor to confer title. The sale by the State of a shallow lake, without authority of law, or without title, was a nullity. It was, therefore, competent for the State to tender back the price paid; and, on refusal by the pretended purchaser, to return the certificate of entry and to sue for the nullity of the entry of the land.

12. A judgment at the suit of the State, annulling the entry and patent issued in error, is conclusive.

13. The administrator of a succession which, though apparently solvent, owes debts and is unsettled, and which the heirs, though present, have never accepted, may bring a real action for the recovery of property claimed to belong to the succession and held by adverse title not derived from the decedent in his own name, and without joining the

heirs, and *vice versa*. Woodward, A. D., vs. Thomas, 38 An. 238.

14. A judgment of a court cannot be questioned collaterally, unless the nullity is absolute. 10 Wall. 308; 6 La. 635; 40 An. 659; 111 U. S. 578; 119 U. S. 642; 20 Wall. 350; A. & E. Encyc., Vol. 12, 147; 138 U. S. 439; Simmons vs. Saul, 138 U. S. 153.

15. The judgment of the Federal Court, in the case of Smith vs. Turner, decreeing the plaintiff to be entitled to the lands sued for, to-wit: 35 and 18-100 acres, is not *res adjudicata* as to the claim of the plaintiff in this case for the balance of the "Silver Lake" property. The plaintiff in that case objected to testimony as to the value of the whole tract on the specific ground that only that particular part of 35 and 18-100 acres was affected by the litigation; said contention being sustained by the Court, and it being distinctly stated by the Court that nothing was at issue except the question of ownership of the 35 and 18-100 acres, and the testimony of the value of the whole tract being refused for this reason. On appeal, the Supreme Court of the United States, the plaintiff Smith having moved to dismiss the writ of error, concluded by saying: "It is therefore submitted that no question is raised in this regard, except as to property worth about $2000.00, and therefore the writ of error should be dismissed." And the Supreme Court, having thus concurred in the view entertained by the counsel of Smith and in the ruling of the Circuit Judge, dismissed the writ of error, holding that no property was at issue or *could be affected* by the judgment in the case, except that particular tract of 35 and 18-100 acres sued for and claimed by the plaintiff to be in the pos-

session of George A. Turner. Evidently such judgment is not *res adjudicata* against plaintiff's claim for the balance of the "Silver Lake" property.

The defendants in this case, the plaintiffs in that, are estopped by their pleading and contention, both in the lower court and the Supreme Court of the United States, by their objection to testimony to prove the value of the whole tract and their plea to the jurisdiction on the grounds set up and maintained by them in both courts. Railroad vs. R. N. Smith et als., 135 U. S. 195.

On the 5th day of May, 1896, the Vicksburg, Shreveport & Pacific Railway Company brought this action against Albert Tibbs and a large number of other trespassers and occupants of the tract of land in the City of Shreveport, described as lots 1 to 9, inclusive, of Section Thirty-One (31), Township Eighteen (18), Range Thirteen (13) West, being One Hundred and Seventy-Eight and 80-100 (178.80) acres, less Thirty-Five and 18-100 (35.18) acres, which was the subject of the action in the case of R. N. Smith et al. vs. George A. Turner et als., leaving One Hundred and Forty-Three and 62-100 (143.62) acres of the tract as the subject matter of this contest. Its value is alleged in the petition to be more than Ten Thousand ($10,000.00) Dollars and the annual use thereof at One Thousand ($1000.00) Dollars per annum.

In December, 1898, the defendants filed an appear-

ance, disclaiming ownership and setting up that they were put in possession of the property by A. H. Leonard, G. R. Wilson, and the Heirs of W. W. Smith. Leonard, Wilson, and the Heirs of Smith, filed an exception, setting up the judgment in the case of R. N. Smith et al. vs. George A. Turner et al., in Judge Boarman's Court, as *res adjudicata*, in bar of plaintiff's demands. The then District Judge, having had some personal interest in the controversy, recused himself, and Judge Watkins of the Second District was called to try the issue. Delays incident to this condition of things prevented the trial of the exception for some time, but the same when tried was overruled. Whereupon, an answer was filed in which the substituted defendants reiterated for their principal defense their former plea of *res adjudicata*, and claiming to be owners of the property by virtue of a purchase by their ancestor and vendor, W. W. Smith, from the State of Louisiana on the 14th of May, 1853, as a shallow lake which they claimed the State had acquired from the Federal Government under the Swamp Land Acts of 1849 and 1850.

After these proceedings, the defendant was forced in the Federal Court into the hands of a Receiver, and J. H. McCormick, as such Receiver, was substituted as plaintiff. The lands of the original plaintiff, under the direction of the Federal Court, were sold at public

sale, and Mr. C. C. Harvey was the adjudicatee at said sale, and the sale being confirmed, Mr. C. C. Harvey has become the substituted plaintiff in this case.

As plaintiffs in this, a petitory action, we must, as a matter of course, show our title. The original grantee, the V. S. & T. R. R. Co., was organized in 1853, by the Legislature of Louisiana, having for its purpose the construction of a railroad from a point opposite Vicksburg, through Monroe and Shreveport, to the Texas State Line; and on the 3rd of June, 1856, pursuant to the policy, the Federal Government, then adopting for the development of its territory what was known as the Land Grant Act was passed. That Act granted to the State of Louisiana, for the purpose of aiding in the construction of a railroad from the Texas State Line west of the town of Greenwood, via Greenwood, Shreveport and Monroe to a point on the Mississippi River opposite Vicksburg, every alternate section of land designated by odd numbers for six (6) sections in width on either side of said Road, etc. The Third Section of that Act provided, that "the said lands hereby granted to said State shall be subject to the disposal of the Legislature for the purpose aforesaid and no other, and the Railroad shall be and remain a public highway for the use of the Government, etc."

Here permit us to remark that this was clearly an appointment by the United States of a Trustee for a

specific purpose—the performance of a naked, plain duty, restricted, as in the language of the Act, "for the purpose aforesaid and no other." The Trustee took the lands for the purpose for which they were granted, and for no other purpose.

Immediately following this Act of 1856, the line of the road was established, and by Act 98 of 1857 the State accepted the trust conferred by the Government in the above Act of Congress, using the following language: "And the same are all and severally hereby and upon the same terms, disposed of, granted to and conferred upon the Vicksburg, Shreveport and Texas Railroad, a body corporate, existing under the laws of the State of Louisiana."

On the 19th of March, 1857, the Legislature authorized the Railroad to mortgage the lands. In the September following, the original mortgage was executed. In the meantime, pursuant to the provisions of the Act of Congress of the 3rd of June, 1856, and the Act of the Legislature of March 7th, 1857, early after the acceptance of the trust, appointed agents to select the indemnity lands, and make maps and lists of all the lands; the same was submitted to the Commissioner of the General Land Office and the Secretary of the Interior; the whole being duly filed in the office of the Secretary of the Interior, were withdrawn from sale, settlement or

entry. These lists of lands were then certified to the State for the use of the grantee by the Commissioner of the General Land Office and the Secretary of the Interior, and convey as complete titles as patents; and lands embraced in said lists and certificates are not thereafter open to settlement or entry. Legal title passes as completely by certification as if patent issued.

Rev. Stat. U. S., Sec. 2449.

Garriques vs. A. T. & S. F. R. R., 6 Land Dec., p. 543.

Frazier vs. O'Conner, 115 U. S. 102.

Mower vs. Fletcher, 116 U. S. 381.

Therefore, in so far as the Government or grantor was concerned, it was divested of title, and the title through the trustee invested in the real grantee, the V. S. & T. R. R. Co.

We will not rehearse the history of these lands in this connection, in so far as our title is concerned, any further than is necessary, it being understood that defendants do not controvert our chain of title. Let it be sufficient to say, that the mortgage on the lands authorized by the State and executed in September, 1857, after the war was closed, under authority of the Federal Court, and the V. S. & P. R. R. Co., the original plaintiff in this case, became the owner and purchaser of all the rights of the original grantee, and was the actual owner of the property in question when

the receivership of J. H. McCormick was established by the Federal Court after the filing of this suit. All the proceedings showing our title are contained in the record. We assume that the Court, as did the counsel in the lower court, admitted our chain of title, and will judicially recognize the fact that the chain of title under which the plaintiff in this case claims, has time and again undergone examination by your Honorable Court, and there can no longer be any question as to the ownership of the original plaintiff of the lands, the subject of the grant of 3rd of June, 1856. The cases to which we refer are: Railroad vs. Sledge, 41 An. 896; Mower vs. Kemp, 42 An. 1007; State vs. Railroad Co., 44 An. 981; and Railroad Co. vs. Elmore et als., 46 An. 1242.

In State vs. Railroad Co., 44 An. 1002, we find the following:

"We have been called on, on two occasions, to examine into the rights of the present defendant in and to the lands embraced in the Act of June 3rd, 1856, once in the case of the V. S. & P. R. R. Co. vs. Sledge, 41 An. 896, and once in that of Kemp vs. Mower, 42 An. 1007, and whilst by reason of a difference of parties in the present case and those cited the decisions rendered therein do not fall technically under the plea of *res judicata*, they none the less substantially dispose of the issues raised in this."

It will be observed, then, that our title is direct from the original owner of the property. The Federal Government owned the land and the patent or certificate, upon which we rely, is from the original owner.

The defendants claim to have purchased the land in question as a shallow lake from the State; then arises the important question, where did the State derive its title? assuming that the Federal Government was the original owner. Our contention is, and that of the State has been for nearly fifty years, that they were mistaken, that the State had no title to convey to them, that the sale under which they claimed was a nullity, and that they were selling property that did not belong to the State, and such has been the action of the Federal Government ever since. The facts are simply these: the Act under which Smith claimed to enter the lands as "Shallow Lake," on the 14th of May, 1853, was not promulgated until the 23rd day of June, thereafter, and it is evident that the Act was the product of some enterprising individual, and the extraordinary expedition of the sale clearly indicates undue enterprise.

THE SALE TO SMITH BY THE STATE AN ABSOLUTE NULLITY.

Smith claimed under the Act of 30th of April, 1853, authorizing the Register of the Land Office to sell certain shallow lakes in the State of Louisiana. The Act

was not promulgated until the 23rd of June, 1853, and therefore was not in effect, if ever, when Smith claimed to have entered the lake on the 4th of May, 1853. The Federal Government was the original owner of the property; there is no legislation or acts whatever upon the part of the Federal Goverument in existence, nor has there ever been any grant or transfer of the Shallow Lakes in Louisiana to the State. Upon the contrary, the universal construction of the Swamp Land Act of 2nd of March, 1849, and Sept. 17th, 1850, by the United States Land Office and the Department of the Interior, Shallow Lakes were not included under said grant, nor were they ever listed to or patented to the State or considered Swamp Lands under the terms of those Acts. On the 5th of March, 1853, however, the following resolution was adopted by the Legislature of Louisiana:

"RESOLUTION.

"Requesting our Senators and Representatives in Congress to procure the passage of an Act authorizing the Secretary of the Interior to cause to be selected certain Shallow Lakes in this State, as a part of the lands donated by Congress.

"WHEREAS, a large portion of Louisiana has been covered with lakes, which, in many instances, have been, or may be drained, while others cover a large extent of country during the season of high water only;

and, whereas, the Commissioner of the General Land Office at Washington City has given instructions to the Surveyor General that these lakes are not considered land; and, whereas, under these instructions, the Surveyor General cannot select them as enuring to the State under the Acts of Congress of second of March, one thousand eight hundred and forty-nine, and seventeenth of September, one thousand eight hundred and fifty. Therefore,

"Be it resolved, by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That the Secretary of the Interior be requested to order a selection of such shallow lakes in the State of Louisiana as cannot be made navigable, or if navigable, then the portions thereof to the low water line; and if, upon examination, he shall determine that he has no such power:

"Resolved, That our Senators and Representatives in Congress be requested to procure the passage of a law granting such necessary power to the Secretary of the Interior."

At the same session of the Legislature, the Act No. 284, authorizing the Register of the Land Office to sell certain shallow lakes in the State of Louisiana, was passed, as above stated. One of the provisions of said Act reads as follows:

"Provided said sale shall not be made until the lands have become the property of the State."

We have searched in vain the records to find any affirmative response to the resolution above quoted by the Legislative and Executive authority of the Government. However, we do find that the Supreme Court of the United States, in French vs. Fyan, 93 U. S. 169, decided:

"That, by the Second Section of the Swamp Land Act, the power and duty involved on the Secretary of the Interior, as the head of the Department, which administered the affairs of the Public Land, of determining what lands were of the description granted by that Act, and made his office the tribunal whose decision on that subject was to be controlling."

Quoting the above in Rogers Locomotive Works et als. vs. The American Immigrant Co., 164 U. S. 571, the Court says:

"The identification of lands as lands embraced by the Swamp Land Act was therefore necessary before the State could claim a patent or exercise control of them." *

There is no proposition better settled than that the Secretary of the Interior was vested with judicial power under the Swamp Land Act in determining the character of lands embraced therein.

Under the Act of 3d of June, 1856, the lands, the

* Frundon vs. Mercaef 10 Mis. Sol
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Vol 8 - 295.

subject of the donation to the V. S. & T. R. R. Co., were duly selected and listed as required, and the identical property now in dispute was certified by the Commissioner of the General Land Office and approved by Secretary of the Interior Thompson, October 3d, 1859; the Federal Government thus patenting the lands to the Company. The United States Land Office at Washington, in passing upon the title to the identical tract of land involved in this suit, decided that it belonged to the V. S. & T. R. R. Co. In the case of J. W. Carlin vs. the V. S. & P. R. R. Co., the Commissioner of the General Land Office decided, March 28th, 1872, that these lands fell within the Railroad grant, and in approving said decision, Secretary of the Interior Delano used the following language:

"In view of the foregoing facts, I am of the opinion that the land in controversy constitutes part of said section thirty-one, that they were withdrawn from the market 31st of May, 1856, and were duly certified and approved to the State of Louisiana for the benefit of the said V. S. & P. R. R., under Act of Congress approved June 3rd, 1856.

"Having been thus withdrawn and certified, these lots are not subject to the rights of homestead entry. I think, therefore, the Government is committed to this view."

In March, 1881, in cases of J. A. King and Ambro

and Martelle vs. the V. S. & P. R. R. Co., all of this being found on page 98 of the record, Secretary Kirkwood used the following language in passing upon the title of the plaintiff to the property in question:

"In disposing of the case as thus presented, it is only necessary to say, that the subject matter involved was decided against the appeal of a former claimant upon these identical lands by my predecessor, Secretary Delano, March 20th, 1872, who held the lands were originally part of Section 31, and were properly certified to the State in 1859, for the benefit of the road.

"The foregoing decisions touching the lands in question had the force and effect of *stare decisis*, the approval of the list containing the particular lands as part of the grant earned by the Company must be considered as a final adjustment and disposition of the subject as far as the jurisdiction and power of the Department extended."

Thus it will be seen that the judicial power of the Land Department of the United States has time and again passed upon the character of these lands, and uniformly have held, from 1859 to the present time, that the lands were included in the Act of 3rd of June, 1856, and necessarily excluded from the provisions of the Swamp Land Act. In other words, a shallow lake, under the construction of the Department, was never

Swamp Land and never has been so treated: and notwithstanding the resolution of the Legislature of Louisiana passed in 1853, requesting a change of the Department's views upon the subject.

THE STATE ANNULS THE ENTRY BY SMITH.

On the 3rd of December, 1857, the State of Louisiana, being then satisfied that the sale to Smith was erroneous under the Act of 1853, after tendering to Smith the price he had paid the State for the land, brought suit against W. W. Smith in the District Court of Caddo Parish to procure the cancellation of the patent and to have the sale of the land to Smith decreed a nullity. The petition in that case sets forth that the Register of the Land Office permitted the entry and issued the patent to W. W. Smith to "Silver Lake," 186.57 acres, and "Cross Lake," containing 21.15 acres, in error. First, because the law under which said entries were made had not been promulgated at the date when said entries were made; second, because said lakes had not, at the time of said entries, been legally surveyed, nor had the surveys been recognized by the State, nor have they yet been; third, because the patent to "Silver Lake" was issued by L. J. Segur, Register, in error of the fact that the law was not promulgated at the time of the entries, and also in error of the other fact that the entry had

been cancelled before the law had been promulgated.

The answer to these allegations was filed by J. W. Smith, Administrator of the Succession of W. W. Smith, and was a general denial and a claim that W. W. Smith had acquired all of the rights that the State of Louisiana had. On the trial, it was shown by W. H. Crenshaw as a witness, who was Register of the State Land Office when Smith bought the land, that the land sold to Smith was never Swamp Land nor sold as such B. Harrolson, who was Register at the time in 1857, testified that in the Warrant Book, opposite Smith's entry of "Silver" and "Cross Lake," the following words appeared in the handwriting of W. H. Crenshaw, Register, to-wit: "This sale is cancelled, because sold in error, the law not having been promulgated. Signed June 5th, 1853, William H. Crenshaw, Register."

The evidence of Mr. Crenshaw shows that the notice of cancellation was served on Smith; it also shows a legal tender of the money which he had paid for the land anterior to the bringing of the suit. There was judgment for plaintiff Nov. 21st, 1860, after trial and verdict by jury, cancelling the entry and the patent. Orders of appeal were granted J. W. Smith, Administrator, returnable to the Supreme Court at Monroe for the second Monday in July, 1861. The war being in progress and continuing for some years, the Court met

in this District for the first time in August, 1866. Except to continue the case until 1869, no action was taken therein, when the minutes show that by consent of counsel, the Supreme Court, on August 11th, 1869, dismissed the appeal. This left the judgment in the District Court by Judge W. B. Egan cancelling the entry and title in full force, with the entry cancelled and the patent thereunder annulled. Thus, the State had done all in its power to correct the error permitting the entry by W. W. Smith, in 1853, and thus acquiescing in the construction by the Land Department of the Government, that under the terms of the law, the land was shallow lake and not swamp land, and the necessary effect thereof was that it was covered by the grant to the original plaintiff on the 3rd of June, 1856.

Thus, it appears that whatever rights Smith received in virtue of his attempted entry, in 1853, the same had been annulled and the whole proceedings and his rights thereunder cancelled.

Whilst it is true that plaintiff, in a petitory action, must recover on the strength of his own title and not on the weakness of that of his adversary, yet it is entirely proper to show that the adverse party in possession is really without title and a trespasser in fact, and plaintiff, in a petitory action, is not required to

show as good and strong a title against a trespasser as against a person who has title. The contention of defendant in this case was urged in a case entirely similar, growing out of the same entry, Smith being one of the parties thereto, and was disposed of adversely to defendants' contention.

Defendants, however, in this case, urge that the judgment rendered by the District Court, in the case of the State vs. W. W. Smith, in 1860, is a nullity, because it was not proper to wage a contest in which realty was involved, against an administrator, and that the laws of Louisiana require that the heirs of Smith should be made parties. Again, they allege that the Supreme Court of Louisiana had no right to dismiss the appeal as the curator and administrator had been discharged in 1867.

In December, 1894, the defendants in this case brought suit against the Texas and Pacific Railway Co., in the Federal Court, for a portion of land in the City of Shreveport, acquired by their ancestor and author at the same time and in the same manner, and with like conditions as that now in contest between the parties hereto. Judge Boarman rendered judgment for the plaintiffs, the present defendants. The effect of the judgment in the case of the State vs. Smith, for the annullment of his entry, was the principal issue involved in said case. On appeal to the Supreme

Court of the United States, Judge Boarman's action was reversed and the case remanded for retrial. 159 U. S. 67. On a second trial, a similar judgment was rendered in the Federal Court, and on appeal to the Circuit Court of Appeals, which, in the meantime, had been established, the United States Court of Appeals reversed the judgment of the lower court, and the same will be found reported in 91 Fed. Rep. 483, and 33 C. C. A. 648. The Supreme Court of Louisiana was sitting, in 1866, as a Court of General Appellate Jurisdiction, Smith, the Administrator (for it will be noted that the heirs were all non-residents at that time), who might be treated as the curator of a vacant succession, appeared and filed an answer, when same was continued; and in 1869, the appeal was dismissed on motion of both parties.

It is elementary that the action of the Court in such a matter cannot be attacked collaterally. If, in its judgment of dismissal, in 1869, the Supreme Court of Louisiana made a mistake, the heirs of W. W. Smith, during the last forty years, might have applied to that Court for relief, but any other Court has no right to ignore this action. On this point, a great many authorities will be found. In the case of Cooper vs. Reynolds, 10 Wall. 308–16; In Dupree vs. Reggio, 6th La. 635, it was held that the correctness of the judgment of a Court of Probate could not be ques-

tioned in the District Court. In Ludeling vs. Chaffe, 40 An. 649, it was held that the judgment cannot be questioned collaterally unless its nullity is absolute. In Colt vs. Colt, 111 U. S. 578, it was held that the decree of the Supreme Court of Connecticut could not be attacked collaterally on the ground that the minor was not properly represented before the State Court. In Barrell against Tilton, 119 U. S. page 642, a decree of a State, declaring the right of a maried woman to mortgage her property, was not held to be liable to collateral attack in the Federal Court. In Cornell vs. William, 20 Wall. 250, the same rule was laid down in the proceedings in a County Court of Texas. It is even been held in many cases that a judgment cannot be impeached collaterally on the ground that the defendant was dead at the time the writ issued or the judgment was rendered. A list of such cases can be found in the A. and E. Ency. of Law, 12 Vol., 147. The case of Simmons vs. Saul, 138 U. S. 439, is very much in point, as to the effect of the action of the Supreme Court, and is strong authority that the action of the Supreme Court, in the case of the State of Louisiana vs. Smith, it was there held, even as to the action of the Probate Court in Louisiana, when jurisdiction once attached, no informalities as to notices, advertisements, etc., in the subsequent proceedings, could be held to oust that jurisdiction.

Perhaps, if the Supreme Court had had attention called to the fact that Smith, the Administrator, had been discharged in 1867, it might have directed some notice to be given under its rules, as in the case of death of a party. If it ought to have done so, the failure to do so could only have been an error, and could not have ousted the jurisdiction which existed by the administrator taking appeal, and the State coming in and answering in 1886.

The language of Justice Lamar, in Simmons vs. Saul, 138 U. S. at foot of page 153, is very instructive. "There is another important principle. It has often been decided that as the Superior Courts, of which the Supreme Court of Louisiana is one, when the jurisdiction had been upon the facts not apparent on the record, such facts will be presumed in a collateral proceeding, and that presumption cannot be rebutted by evidence *dehors* the record." A large number of decisions to this effect can be found in the Ency., page 147.

So, in that case, it was definitely determined that the judgment of the Court cannot be collaterally attacked and, therefore, that the decree dismissing the appeal in State of Louisiana vs. Smith, in 1869, was a valid judgment, to which full effect must be given. And the case was reversed a second time, and the T. & P., the defendants, decreed to be the owner of the

property. There are special features of this case that make it exceedingly interesting in this controversy, because of the indentity of facts and the action had thereon, and this puts at rest, absolutely, the contention that the judgment of the District Court, by Judge Egan, in the case of the State vs. W. W. Smith, for the cancellation of his entry of the land in question, and his patent, therefore, was null and gives full effect to said judgment. This being the case, then, if Smith ever had any title to the land in question, it was absolutely destroyed and annulled at the suit of the author of his title, after issue joined by a court of competent jurisdiction, and was therefore *res adjudicata*, and put an effectual estoppel against Smith and all who claim under him in virtue of the entry thus cancelled. Then are we not justified in saying that the defendants in this case are absolutely without title?

Now, then, we revert to our title again.

The certificate of the Secretary of the Interior, that certain lands enured to the State, under the Railroad Act of 1856, was a decision that they were not embraced by the Swamp Land Act of 1850. In our case, it appears that the original certificate to that effect, of Secretary Jacob Thompson, has been time and again, by the various Secretaries of the Interior, approved and confirmed, and has become absolutely the rule of action of the Government.

The acceptance by the State of lands certified to it by the Secretary of the Interior, as included in the Railroad Grant of 1856, is conclusive upon the State against a claim to lands under the Swamp Land Act of 1850; while no patent has been issued or identification of these lands made by the Secretary of the Interior under the latter act. Rogers' Locomotive Machine Works et al. vs. American Immigrant Company, 164 U. S. 559-577. This case, decided in 1896, reviews all the previous decisions upon this question, and settles effectually the law on the subject involved. It is so entirely applicable, we ask the indulgence of the Court for making copious extracts therefrom, as, indeed, it is conclusive of the issues in this case.

Mr. Justice Harlan delivered the opinion of the Court and said:

"The present suit was brought by the American Emigrant Company for the purpose of obtaining a decree quieting its title to certain lands in Calhoun County, Iowa. The plaintiff asserts title under the Act of Congress known as the Swamp Land Act of 1850 (9th Stat. at L. 519, Chap. 84); the defendants, under the Act of Congress of May 15th, 1856 (11th Stat. at L. 9, Chap. 28), granting land to Iowa in aid of the construction of various railroads in that State, among others, a railroad from Dubuque to Sioux City with a

branch from the mouth of the Tete Des Morts to the nearest point on the road.

"The principal contention of the plaintiff is that the lands passed to the State under the Act of 1850, and were not embraced by the Railroad Act of 1856.

"A decree was passed adjudging the plaintiff to be the owner of some of the tracts described in its petition. As to the other tracts, the suit was dismissed. Upon appeal by the defendants to the Supreme Court of Iowa, the decree was affirmed. 83 Iowa, 612. The present writ of error brings that decree before us for examination.

"By the above Act of September 28th, 1850, all swamp and overflowed lands made unfit thereby for cultivation, were granted to the respective States in which they were situated, that they might be reclaimed by the construction of the necessary levees and drains. By the second section of that act it was made the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to make out an accurate list and plats of such lands, and transmit the same to the governor of the State, and at the request of the latter, 'cause a patent to be issued to the State therefor, and on that patent, the fee simple to said lands shall vest in the said State.'

"The Legislature of Iowa, by an act passed February 5th, 1851, authorized the Commissioner of the State

Land Office to take such steps necessary to secure to the State the lands granted by the above act. To that end, the Commissioner, having reason to believe there were many tracts of swamp land within the State not reported as such by the United States Surveyor, sufficient *to justify* a more particular examination, was to direct the county surveyor of any county in which the lands were located 'to make the examination and provide the proofs necessary to secure such lands to the State, a list of which shall be returned to the Land Commissioner or the authority acting in that capacity, verified by affidavit,' etc. Iowa Laws, 1850-51, Chap. 69, p. 169.

"By a subsequent Statute of Iowa, passed January 13th, 1853, the swamp and overflowed lands granted to the State by the Act of 1850, were granted 'to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains to reclaim the same; and the balance of said lands, if any there be, after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county.' The same act provided that whenever 'it shall appear that any of the lands granted to the State by the aforesaid Act of Congress, shall have been sold

by the United States since the passage of that act, it shall be lawful for the said counties to convey said lands to the purchasers thereof.' It also provided that in all the counties where the county surveyor had made no examination and report of the swamp lands within his county, in compliance with the instructions from the governor, the county court should appoint some competent person, who should proceed 'to examine said lands and make due report and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made marked on the said plats, to the county courts respectively, which courts shall transmit to the proper officers lists of all said swamp lands in each of the counties, in order to procure the proper recognition of the same on the part of the United States, which lists, after an acknowledgment of the same by the general government, shall be recorded in a well bound book provided for that purpose, and filed among the records of the county court.' Iowa Laws, 1852, Chap. 12, p. 29.

"By another Act, also passed January 25th, 1855, amendatory of the Act of January 13th, 1853, it was provided: 'Sec. 1. That no swamp or overflowed lands granted to the State, and situate in the present unorganized counties, shall be sold or disposed of till the title to said lands shall be perfected in the State,

whereupon the title to said lands shall be transferred to the said counties where they are situated.'

"It appears that, in 1856, the county court of Calhoun county appointed Charles Amy to select and survey the swamp lands in that county, in accordance with the provisions of the above act of January 13th, 1853."

"This was after the passage by Congress of the Railroad Act of May 15th, 1856, granting lands to the State of Iowa to aid in the construction of certain railroads in that State. 11 Stat. at L., Chap 28. By that act, there was granted to Iowa, to aid in the construction of the railroads, among them a railroad from Dubuque to Sioux City, with a branch, every alternate section of land, designated by odd numbers, for six sections in width on each side of the respective roads named by Congress. If it appeared at the time the route of a road definitely fixed, that the United States had sold any of the sections or parts of sections granted, or that the right of preemption had attached to the same, then the State, 'subject to the approval of the Secretary of the Interior,' was entitled to select other lands nearest to the sections granted to supply the deficiency. But it was declared, 'that any and all lands heretofore reserved to the United States by any act of Congress, or any other manner by competent authority, for the purpose of aiding in any object of in-

ternal improvement, or for any other purpose whatsoever, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

"The above Act of May 15th, 1856, with its provisions and restrictions, was accepted by the State by an act approved July 14th, 1856, and the lands, interests, rights, powers and privileges granted by Congress, so far as they related to the proposed road from Dubuque to Sioux City, were granted and transferred to the Dubuque and Pacific Railroad Company, to aid in the construction of its railroad and branch, subject to the conditions and incumbrances prescribed by Congress. These lands were transferred to the railroad company upon the express condition that, if it did complete and equip a given number of miles of its road within a named time, and its entire line on or before such certain date, then the State might resume all rights to the lands so granted and remaining undisposed of by the company. Iowa Revision, 1860, Chap. 55, p. 215, Art. 2.

"By a Supplementary Act passed January 28th, 1857, the companies obtaining the benefits of the Act of Congress of 1856, and of the Act of the Iowa Legisla-

ture of July 14th, 1856, were authorized to make such disposition, by mortgage or deed of trust, of the lands granted by the Act of 1855, as might be deemed proper to secure construction bonds necessary for the completion of their roads, such mortgage or deed of trust to be a binding and valid lien upon all the property mentioned therein, including rolling stock, and the purchasers, under a trustee's sale of foreclosure of mortgage, to have and enjoy all the rights of a purchaser on execution sale. Iowa Revision, 1860, Chap. 55, p. 222, Art. 5.

"It was stipulated by the parties that the lands in controversy 'are within the limits of the railroad grant of May 15th, 1856, to aid in building a railroad from Dubuque to Sioux City, and were earned by the building of said road if they were subject to said grant; and that the various defendants hold, by apt and sufficient conveyance, all the title and interest in said lands which passed under and by said grant, if any title or interest did pass thereunder or thereby.' This, of course, implies that the railroad company performed all the conditions prescribed in reference to these lands, either by the Act of Congress of May 15th, 1856, or by the Acts of the Iowa Legislature.

"It appears in evidence that the lands in controversy and other lands were certified to the State by the General Land Office of the United States, under date

of December 25th, 1858, as lands within the six mile or place limits defined by the Act of Congress of May 15th, 1856, 'being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for six sections in width on each side of the Dubuque and Pacific Railroad and branch within the State of Iowa.' The lists of those tracts were first submitted by the Commissioner of the General Land Office, 'for the approval of the Secretary of the Interior, in accordance with the requirements of the said Act of May 15th, 1856, subject to all of its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.' The certificate of December 25th, 1858, was indorsed by the Secretary of the Interior: 'Approved subject to the conditions and rights above mentioned.'

"It was further stipulated in this case, that 'all the lands in controversy were selected by duly appointed and authorized agents of Calhoun County, as swamp lands, under the Act of Congress of September 28th, 1850, and reported the same to the County Court of Calhoun County September 30th, 1858.'

"On the 27th of March, 1860, the Surveyor General of the State of Iowa certified that the lists of lands that had been selected by the county surveyor or State locating agents as swamp lands had been carefully compared with field notes, plates and other evi-

dence on file in his office, and, 'by the affidavits of said county surveyors or State locating agents, it appears that the greater part of each smallest legal subdivision of the lands embraced in said list is swampy or subject to such overflow as to render the same unfit for cultivation, and is therefore of the character contemplated by the Act of the 28th of September, 1850.' The list was endorsed by the General Land Office: 'Received with the Surveyor General's letter of March 27th, 1860.'

"The list of the lands selected in the manner above stated by the agents of Calhoun County, together with a letter from the Commissioner of the General Land Office, dated February 12th, 1874, was received at the local land office at Des Moines, Iowa, on the 18th day of February, 1874.

"It does not appear that the Secretary of the Interior ever took any action in respect to the lists made by the agents of Calhoun County of lands selected by him as swamp lands, nor that the State or the county, nor anyone claiming under the county, ever directly sought any action by the General Land Office or by the Secretary of the Interior in respect of such selections.

"It should be here stated, that on the 12th day of December, 1861, a written contract was made between the County of Calhoun, Iowa, and American Emigrant

Company, in relation to the swamp and overflowed lands in the county. Subsequently, in 1863, the county conveyed to the company, subject to the provisions of the Swamp Land Act of 1850, the lands in controversy and other lands, upon certain conditions which it is unnecessary to set forth. In the light of these facts, and of the Federal and State Legislatures relating to the matters in controversy, we proceed to the consideration of the questions presented for our determination.

"As the Railroad Act of 1856 excepted from its operation all lands theretofore reserved to the United States by any Act of Congress, or any other manner by competent authority, for any purpose whatever, the certification to the State by the Department of the Interior of the lands in controversy as having inured under the railroad act of May 15th, 1856, to the State for the benefit of the Dubuque and Pacific Railroad Company, was unauthorized, if, at the date of the Swamp Land Act of 1850, the lands were swamp and overflowed lands, whereby they were unfit for cultivation; for lands of that character were expressly reserved from the operation of the railroad grant of 1856. If they were not granted to the State for the benefit of the railroad company, because previously granted to the State as swamp and overflowed lands, they could properly

have been certified or transferred to the State, to be applied in aid of the construction of the railroad. McCormick vs. Hayes, 159 U. S. 332, 338.

"But it is equally true, that the Act of 1850 made it the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to make out an accurate list and plats of the swamp and overflowed lands granted to any State and transmit them to the Executive of the State, 'and, at the request of said Governor, cause a patent to be issued to the State therefor; and *on that patent* the fee simple to said lands shall vest in said State,' subject to the disposal of its legislature. While, therefore, as held in many cases, the Act of 1850 was *in praesenti*, and gave an inchoate title, the lands needed to be identified as lands that passed under the act, which, being done, and not before, the title became perfect as of the date of the granting act. Wright vs. Roseberry, 121 U. S. 488, 494 (30; 1039, 1040) *et seq.;* Tubbs vs. Wilhoit, 138 U. S. 134, 137 (34; 887, 888); Chandler vs. Calumet and H. Min. Co., 149 U. S. 79, 91 (37; 657, 661). So, in Ehrhart vs. Hogaboom, 115 U. S. 67, 68 (29; 346). In French vs. Fyan, 93 U. S. 169 (23; 812), this Court decided, that by the 2nd Section of the Swamp Land Act, the power and the duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of the

public lands, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling. The identification of lands, as lands embraced by the Swamp Land Act, was therefore necessary before the State could claim a patent or exercise complete control of them.

"In McCormick vs. Hayes, above cited, it appears that the Secretary of the Interior, proceeding under the railroad act of May 15th, 1856, had certified certain lands as inuring to Iowa under that act. It was insisted in that case that the lands were covered by the Act of 1850, and, therefore, that they were improperly certified under the Railroad Act of 1856; a fact which, it was contended, could be established by parole evidence, so as to fix the title in certain parties, independently of any action that may have been taken by the Interior Department upon the subject. The precise nature of the case is shown by the extract from the opinion of the Court: 'The controlling question, therefore, in this case, so far as the plaintiff is concerned—and he must recover upon the strength of his own title, even if that of the defendant be defective—is whether, under the circumstances disclosed by the record, the particular lands in controversy, in the absence of any selection and certification of them by the United States to the State, under the Swamp Land

Act, can be shown by parole testimony to have been, in fact, at the date of the act, swamp and overflowed lands. Congress having made it the duty of the Secretary of the Interior to make out accurate lists and plats of the lands embraced by the Swamp Land Act, and transmit the same to the Governor of the State, and at the request of the latter to cause a patent to be issued to the State therefor, and having provided that, on that patent, the fee simple to said lands shall vest in said State subject to the disposal of the Legislature thereof,' did the title vest in the State, by virtue alone, and immediately upon the passage of the act, without any selection by or under the direction of the Department of the Interior, so that the State's grantees could maintain an action to recover the possession of them."

"In determining that question, this Court, after an extended review of former decisions, thus stated (McCormick vs. Hayes, 159 U. S. 346, 347); (40; 175, 176) its conclusions: 'The case before us is not like that of Hannibal and St. J. R. Co. vs. Smith, 79 U. S.; 9 Wall. 95 (19; 599), in which, as subsequently explained in French vs. Fyan, 93 U. S. 169 (23; 812), it was shown that there was an absolute neglect of duty on the part of the Interior Department, in that it neither made nor would make any selection or lists whatever, and therefore there was no action by that

department that could be relied on as a determination of the question whether the particular lands then in dispute were or were not embraced by the Swamp Land Act. That case was exceptional in its circumstances, and seemed to justify the decision rendered, in order to prevent a total failure of justice, arising from the unexplained neglect of the Land Department to perform the duty imposed by the Act of 1850. What was said in French vs. Fyan shows that this Court not only so regarded the previous case, but it was in effect said that the ruling in Hannibal and St. J. R. Co. vs. Smith was not to be extended to any case in which the Land Department had taken action, or made a decision or determination under the swamp land act.' Again, and in reference to the certification of the lands under the Railroad Act of 1856: 'Twice the Land Department certified these lands to the State as inuring to it under the railroad land grant act, and it does not appear that the State has ever questioned the correctness of the certification or applied to the Secretary of the Interior for a re-examination as to the character of the lands.'

* * *

"One of the prior adjudications referred to in McCormick vs. Hayes, was Chandler vs. Calumet, and H. Min Co., 149 U. S. 79, 88, 89, 92 (37; 657, 661, 662). In that case the plaintiff claimed title under the Swamp

Land Act of 1850; the defendant under an act of Congress of 1852, granting public lands to Michigan in aid of the construction of a ship canal around the falls of St. Mary. The lands there in controversy were not included in swamp land selections under the Act of 1850, but were included in selections under the canal grant of 1852. Referring to Wright vs. Roseberry, 121 U. S. 488 (30; 1039), in connection with previous cases, this Court, speaking by Mr. Justice Jackson, said: 'Under the principle announced in that case, and under the foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the Secretary of the Interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which passed to the State by the swamp land grant, and that the selection by the State of the demanded premises under the canal grant of 1852, with the approval of the Secretary of the Interior, and the certification of the department to the State that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. The exclusion of the land in dispute from swamp lands, selected and patented to the State, and its inclusion in the selection of the State as land coming within the grant of 1852, with the approval of

such selection by the Interior Department and the certification thereof to the State, operated to pass the title thereto as completely as could have been done by formal patent; Frasher vs. O'Connor, 115 U. S. 102 (29; 311); and being followed by the State's conveyance to the Canal Company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony in an action at law. Under the facts of this case, we are of opinion that the plaintiff in error could not properly establish by oral evidence that the land in dispute was in fact swamp land, for the purpose of contradicting and invalidating the department's certification thereof to the State and the latter's patent to the canal company.

"These decisions give much greater weight to the action of the land department in certifying the lands in dispute under the railroad grant of 1856, than was done by the judgment below.

"The Emigrant Company lays much stress upon that clause of the Railroad Act of 1856 exempting from its operations all lands previously reserved by the United States for any purpose. And upon this foundation it rests the contention that no lands embraced by the Swamp Land Act of 1850 could, under any circumstances, be withdrawn by the land department from its operation, and certified to the State under the Railroad Act of 1856. This contention assumes that

the lands in controversy were, within the meaning of the Act of 1850, swamp and overflowed lands. But that fact was to be determined, in the first instance, by the Secretary of the Interior. It belonged to him, primarily, to identify all lands that were to go to the State under the Act of 1850. When he made such identification, then, and not before, the State was entitled to a patent, and 'on such patent' the fee simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect as of the date of the act, until a patent was issued.

"But is is equally clear that when the Secretary of the Interior certified in 1858 that the lands in controversy inured to the State under the Railroad Act of 1856, he, in effect, decided that they were not embraced by the Swamp Land Act of 1850. This, perhaps, furnishes an explanation not only of the fact that no action was taken upon the report filed in the General Land Office in 1860, showing that the agent of Calhoun county had selected these lands as swamp and overflowed lands, but of the further fact that, so far as this record discloses, the attention of the Secretary of the Interior was never directly called by the county to any claim by it, under the Act of 1850, to the lands certified under the railroad act of 1856. Nor does it appear that the American Emigrant Company, whose original contract with the county was made in 1861,

ever questioned before the Land Department the validity of the Secretary's certification of 1858 of these lands as passing to the State under the Act of 1856, or asserted a claim to them, until it brought this suit in 1877, nearly twenty years after that officer certified them to the State under the railroad act. And it is significant that this action of the Interior Department does not seem ever to have been called in question by the State.

"The case then is this: In 1858, the Secretary of the Interior decided that the lands in controversy inured to the State under the Railroad Act of 1856, and, if that decision was correct, then they were not reserved from the operation of that act by the Swamp Land Act of 1850. The State was entitled to the lands either under the Act of 1850 or under that of 1856. It was open to it, before accepting the lands under the railroad act, to insist that they passed, under the Act of 1850, as swamp and overflowed lands. No such claim was made. The State—the party primarily interested, and with whom the Land Department directly dealt—accepted the lands under the Act of 1856, and, therefore, not as inuring to it as swamp and overflowed lands within the meaning of the Act of 1850, and, as just stated, has never repudiated its action of 1858, nor sought to have reopened the question necessarily

involved in the action of the Secretary when he certified the lands to the State under the Act of 1856.

"It would seem that, upon every principle of justice, the action of the Secretary of the Interior, in certifying these lands to the State under the Act of 1856, should not be disturbed. The fact that his certification was made subject 'to any valid interfering rights which may exist to any of the tracts,' embraced in his certificate, does not affect this conclusion. That reservation could not have referred to any rights which the State acquired or could have asserted under some other Act of Congress than that of 1856. Certainly, it was not intended by the Interior Department to certify the lands under the Railroad Act of 1856, subject to the right of the State, while holding them under that certificate, to claim them under some other and prior act. The action of the Department in 1858 was intended to be final as between the United States and the State, in respect of the lands then certified as railroad lands. If the State considered the lands to be covered by the Swamp Land Act, its duty was to surrender the certificate issued to it under the the railroad act. It could not take them under one act, and while holding them under that act pass to one of its counties the right to assert an interest in them under another and different act.

"Are those in this action who claim under the State

and under the Act of 1850 in any better condition than the State? Can they be heard to question the action of the Land Department in 1858, if the State is estopped from so doing? We have seen that the County of Calhoun made a written agreement in 1861 with the American Emigrant Company relating to swamp and overflowed lands. But if no such agreement had been made, would the county be heard to say that the Land Department erred, as a matter of fact, when, in 1858, it decided that these lands passed to the State under the Railroad Act? Would the creature of the State be permitted to say what its creator was estopped from saying? The County of Calhoun is a mere political subdivision of the State, created for the State's convenience, and to aid in carrying out, within a limited territory, the policy of the State. Its local government can have no will contrary to the will of the State, and it is subject to the paramount authority of the State, in respect as well of its acts as of its property and revenue held for public purposes. The State made it, and could, in its direction, unmake it, and administer such property and revenue through other instrumentalities. Jefferson County vs. Ford, 4 G. Greene, 367, 370; Soper vs. Henry County, 26 Iowa, 264, 267; Maryland vs. Baltimore & O. R. Co., 44 U. S., 3 How. 534, 550 (11; 714, 721); United States vs. Baltimore & O. R. Co., 84 U. S., 17 Wall 322,

329 (21; 597, 600); Hamilton County Commrs. vs. Mighels, 7 Ohio St. 109, 118; Askew vs. Hale County, 54 Ala. 639, 640; 25 Am. Rep. 730; 1 Dill. Mun. Corp. Secs. 22, 23, 54–71, inclusive, and authorities there cited; Ang. & A. Corp., Sec. 31.

"It seems to be clear that the relations of the county and the State are such that the action of the latter in accepting the lands in controversy under the Railroad Act was binding upon the County of Calhoun, as one of the governmental agencies of the State; and that the country could not, after such acceptance, claim these lands as swamp and overflowed lands, or, by assuming to dispose of them as lands of that character, pass to the purchaser the right to raise a question which, in view of its subordination to the State, it was estopped from raising. We are of opinion that the plaintiff could not, by any agreement made with the county in 1861, or afterwards, acquire any greater rights, or better position, in respect of these lands, than the county itself had after the certification of them in 1858 as lands inuring to the State under the Railroad Act of 1856.

"We are of opinion that the Supreme Court of Iowa did not give proper effect to the action of the Interior Department of 1858. It should have been adjudged that, so far as the lands in controversy are concerned, the plaintiffs claiming under the County of Calhoun

and the State, as well as under the Act of 1850, were concluded by the act of the Secretary of the Interior when he certified such lands as inuring to the State under the Railroad Act of 1856, and by the act of the State in accepting and retaining the lands under that act; consequently, the suit should have been dismissed for want of equity, with costs to the respective defendants.

"*The judgment is reversed*, and the cause is remanded for further proceedings not inconsistent with this opinion."

By this it will be seen that the question of our title is absolutely settled in our favor. Indeed, from the argument in the lower court, we were convinced that defendants relied solely upon their plea of *res judicata*, first plead as an exception and duly passed upon by the Court, then reiterated in their answer, and seemed to be the basis of their hope. This plea of *res judicata* by defendants will be specially treated by our co-counsel, Col. Wise; but we think that the opinion of the District Judge in this case is so clear and conclusive as to need no further argument, and we therefore submit the views of the District Judge upon this subject as conclusive and absolutely unanswerable.

The District Judge in his opinion says:

"This plea is based upon the fact that, in the above

named suit, Robert N. Smith and others sued George A. Turner for 35 and 18-100 acres in the tract of 170 and 80-100 acres, known as 'Silver Lake,' and recovered judgment for it after the Vicksburg, Shreveport & Pacific Railway Company had been substituted as defendants for George A. Turner, lessee. On the trial of that case, the counsel for the Vicksburg, Shreveport & Pacific Railway Company offered to prove that the entire tract of 178 and 80-100 acres was worth $10,000.00. The counsel for the plaintiffs, Robert N. Smith et al., objected to the reception of this evidence on the ground that the title to the 178 and 80-100 acres was not in controversy, but only 35 and 18-100 acres, the tract sued for. Thus, the question was put directly at issue whether the title to the entire tract, known as 'Silver Lake,' was involved in that suit, which is now pleaded in bar of this action, or whether the questions therein involved related only to that particular 35 and 18-100 acres, for which George A. Turner was sued.

"The same parties who now contend that the decision in that case constitutes the thing adjudicated as to the entire tract of 178 and 80-100 acres, at the time successfully contended that nothing was at issue except the question of the right of ownership of 35 and 80-100 acres. In his decision on that point, the presiding Judge said:

"The testimony of the above named witnesses was not heard, because the petition claims only the number of acres held by or in possession of George A. Turner, the defendant; that the judgment in this case, if for plaintiff, could affect only the land held by Turner, and the claim set up by the defendant, Turner, or by the railway, whatever it may be, he does not make this a suit for more than the number of acres of land claimed by the plaintiff, which is about forty acres, more or less, and is shown by admission of counsel not to be worth more than $2000.'"

"This ruling became final between the parties on the question as to whether the entire 'Silver Lake' tract was at issue in that case, or only that part in possession of George A. Turner, because, when the case was carried to the Supreme Court of the United States on a writ of error, the attorneys for Robert N. Smith et al. moved to dismiss the writ of error, because, as they contended, there was no appellate jurisdiction in the Supreme Court, as the only question at issue was the possession of the 35 and 18-100 acres of land, worth not over $2000, and there was no controversy relating to the entire tract of 178 and 80-100 acres, worth $10,000.00. In concluding their motion to dismiss the writ of error, they say: 'It is therefore submitted that no competent question is raised upon this record except as to the

property worth about $2000.00, and therefore the writ of error should be dismissed.'

"The Supreme Court of the United States concurred in the view entertained by the counsel for Robt. N. Smith et al., and in the ruling of his Honor, Judge Boarman, and dismissed the writ of error, holding that no property was at issue, or could be affected by the judgment in the case except that particular tract of 35 and 18-100 acres sued for and claimed by the plaintiffs to be in possession of George A. Turner.

"It is now asked of this Court in this case that the judgment in suit No. 80, United States Circuit Court, awarding Robt. N. Smith et al. the ownership of 35 and 18-100 acres of land be so extended as to cover the entire tract of 178 and 80-100 acres and to ignore that part of the same case in which it is decided by both the Circuit Court and the United States Supreme Court that the decision in the case in no manner involves the entire tract.

"It is the opinion of the Court that the judgment of the Court in suit No. 80 is *res judicata* as to the 35 and 18-100 acres involved in that case, but that it is not a bar to the claim of the plaintiff in this case in which the suit is to recover the remainder of the tract of land, viz: 178 and 80-100 acres, less 35 and 18-100 acres. Hence, the plea of *res judicata* filed by the defendant herein is overruled."

Defendants, by their action in that case, are estopped from setting up this plea of *res judicata.*

There was judgment in the lower court in favor of the plaintiffs and the defendants have brought up this appeal. May we not hope now for an early conclusion of the litigation so long pending between plaintiffs and divers claimants from time to time. In one way or another, for nearly a half century, the plaintiffs have been forced to meet the claims of individuals seeking to avoid the effect of the grant of 1856, with the single exception of the small portion eliminated from this controversy by the tactics of counsel in the case of Smith vs. Turner, we have been successful and this judgment ought to put at rest the question of ownership.

We respectfully ask that the judgment of the lower court be affirmed, reserving our rights to the rents and revenues on the property as per agreement in the record.

Respectfully submitted,

STUBBS & RUSSELL,

Attorneys.